Supreme Court, U.S.
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No. ___

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

William Gasko and Marie Gasko

vs Petitioners,

Celotex Corporation
Flexitallic Gaskets, Inc. and
Ruberoid Co., A Division of G.A.F.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

William Gasko and
Marie Gasko
112 Federal Road
Englishtown, NJ 07726

Telephone:
1/908/446-9205

57 pp

Questions Presented For Review

1. Whether or not Petitioners' rights to a jury trial and verdict in 1988 were violated by Judge Mannion's actions and further denied by the Appellate Court in sending the case back to Judge Mannion for a new trial on all charges even though the facts presented by Plaintiffs supported the Jury decision.

2. Whether or not Petitioners' rights were violated by their attorney's refusal to appeal the 1988 Appellate Court decision.

3. Whether or not the 1992 split Jury verdict was inconsistent with the expert testimony and evidence presented and therefore represents a gross miscarriage of justice.

4. Whether or not the remarks made to the Jury by Judge Hamlin, indicating that asbestosis and mesothelioma are the only diseases acceptably related to asbestos, were prejudicial to the Petitioners' case and influential in the Jury's split decision.

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Statement of Jurisdiction

The judgement in the trial court sought to be reviewed was entered on January 8, 1993 and the final appeal was entered in the New Jersey Supreme Court on March 9, 1994.

The statutory provision conferring jurisdiction on this Court to review the judgement below by writ of certiorari is 28 U.S.C. 1257 (a).

The within petition was filed within ninety days, the last day of filing being June 7, 1994.

Constitutional Provisions Involved

The constitutional provision involved in the first trial in this case in the Seventh Amendment to the Constitution of the United States as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by Jury shall be preserved, and no fact tried to a Jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

In the second trial we invoke the N.J. Constitution regarding Rights and Privileges, Art. 1, 19 Rule 2:10-1.

"Providing that the verdict if contrary to the weight of the evidence shall be set aside..."

Statement of the Case

William Gasko worked at Goetze Gasket, a division of Johns-Manville from 1951 to 1966. During this time he worked with asbestos materials which had no warnings on them. He constantly inhaled and ingested asbestos fibers and dust. He ate in the same place he worked in because there was no lunch room.

Before he left in 1966, Mr. Gasko had complained to the company doctor of a pain in his side. This pain eventually forced him to leave work. In 1974 he was operated on for cancer of the cecum and had part of his intestine removed. The resultant scarring causes discomfort to this day.

Mr. Gasko went to trial and on April 19, 1988 the jury unanimously awarded Mr. Gasko $500,000 and his wife, Marie, $200,000. Judge Mannion signed this

order on May 6, 1988. On May 23, 1988 Judge Mannion signed an order for a remittitur for Plaintiffs and ordered that, if they refused the remittitur, they would face a new trial on all charges, even though the only issue was the jury award. The question of the whole trial being "tainted" did not come up until after the remittitur was refused.

An appeal to the Appellate Court resulted in a reversal of the summary judgement, found the remittitur procedurally incorrect and sent the case back to Judge Mannion, who ordered a new trial on all charges. When Plaintiffs asked their attorney, Mr. Kuhn, to appeal the Appellate decision, they were told they couldn't.

The second trial was held with Judge Hamlin presiding, this same Judge who had declared a mistrial in this case before the 1988 trial with Judge Mannion. This

second trial ended in a split verdict in favor of the defendant. An appeal was made to Judge Hamlin for a new trial on the grounds that the jury's verdict represented a gross miscarriage of justice in that it was not consistent with the expert testimony and evidence presented. This appeal was made on December 8, 1992 and was denied January 8, 1993. Plaintiffs' attorney then told them he would no longer represent them in this matter. All efforts by the plaintiffs to obtain counsel have been denied. Plaintiffs appealed pro se to the Appellate Court for relief and were denied December 23, 1993. An appeal for petition of certification to the New Jersey supreme Court was denied March 9, 1994.

Reasons for Granting Writ

1. In view of the fact presented at the 1988 trial, Petitioners were deprived of their constitutional right to a jury verdict. They were further deprived when the Appellate court sent the case back for a second trial on all charges. Petitioners were tried and retried until a verdict in favor of defendants was reached.

2. Petitioners' right to appeal 1988 Appellate Court decision was denied by their attorney.

3. In light of the expert testimony and evidence presented, the 1992 split jury verdict was inconsistent with the evidence presented and represents a gross miscarriage of justice. We refer to the N.J. State Constitution regarding Rights and Privileges, Art. 19, Rule 2:10-1,

"providing that the verdict if contrary to the weight of the evidence shall be set aside...."

4. In his charge to the Jury, Judge Hamlin tell them, not once, but twice, that if Mr. Gasko had asbestosis or mesothelioma they probably wouldn't even have to be there to judge the case. These remarks associating only certain diseases to asbestos are prejudicial, leading, and can easily influence a jury's line of thought. These biased remarks go against the colon cancer-asbestos relationship and favor the defendants' case.

Conclusion

We pray that the Supreme Court of the United States grant our writ of Certiorari and review this case from beginning to end. We ask that the 1988 trial's unanimous verdict be reinstated because this trial was correct in its entirety. The award by the Jury was proper in light of Mr. Gasko's years of suffering, surgery, loss of part of his intestine, and present discomfort and apprehension of recurrence. To allow a Judge to overrule a Jury and threaten Plaintiffs with a new trial on all charges if they did not accept his remittitur is to make a mockery of the Jury system. We should not be retried on charges that have already been proven to, and accepted by, a Jury of our peers.

If it is not within the power of this court to reinstate the 1988 verdict, we pray that you will review the second

trial of 1992 as to all the witnesses and evidence presented and grant us a new trial on the charges that the split Jury verdict was inconsistent with the expert witness and evidence presented and represents a gross miscarriage of justice. We should also be protected from a Judge making remarks that are definitely prejudicial and influence the thoughts of the Jury.

Sincerely,

Marie Gasko
William Gasko

July 6, 1994

Marie Gasko
William Gasko

Judgements Sought to be Reviewed

A-2565-89T5

State of New Jersey

Dulio Grassis, ET Al
Plaintiffs,

Superior Court
Appellate
Division

and

William Gasko & Marie Gasko
Plaintiffs-Appellants,

v.

Johns-Manville Corp., ET AL,
Defendants

and

The Celotex Corporation
and GAF Corporation,
Defendants-Respondents
Cross-Appellants

May 30, 1991

Before Judges J.H. Coleman, Dreier and Landau

Judgement

Remittitur offered found to be procedurally incorrect. Summary Judgement in favor of Defendant reversed. Case remanded to law division for further proceedings in accordance with this opinion.

Judgements Sought to be Reviewed

A-2963-92T1	State of New Jersey
William Gasko and Marie Gasko	Superior Court Appellate Division
v.	
Celotex Corporation Flexitallic Gaskets, Inc. and Ruberoid Co., A Divsion of G.A.F.	December 23, 1993

Before Judges J.H. Coleman and Thomas

Judgement

The order denying the motion for a new trial and the judgement dismissing the complaint are affirmed.

Judgements Sought to be Reviewed

A-2963-92T1	State of New Jersey
William Gasko and Marie Gasko	Superior Court Appellate Division
v.	
Celotex Corporation Flexitallic Gaskets, Inc. and Ruberoid Co., A Divsion of G.A.F.	March 8, 1994

Before Judge Robert L. Clifford

Judgement

Petition for Certification denied, with costs.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This matter arises out of a jury trial in an asbestos case, which was tried before the Honorable Thomas Mannion, Judge of the Superior Court, on April 12, 13, 14, 18, and 19, 1988. The jury returned a verdict in favor of Plaintiff, William Gasko, in the amount of $500,000.00 and in favor of Plaintiff, Marie Gasko, in the amount of $200,000.00. This case arose out of Plaintiff, William Gasko's development of cancer of the cecum as a result of exposure to asbestos.

From 1951 through 1966, Plaintiff, William Gasko, was employed at the Goetze Gasket Plant. During that time, he worked with asbestos rolls produced at Philip Carey and asbestos sheets produced by Defendant, Rubberoid (GAF). During the course of this employment, Plaintiff had to cut the

asbestos containing product and use the product in the manufacture of gaskets. This cutting of the product and the use of the product in gaskets caused significant amounts of dust to be continually in the air at all times. Obviously, this dust contained asbestos and asbestos fibers which were inhaled by the Plaintiff and co-workers.

On October 10, 1974 through October 22, 1974, the Plaintiff was admitted to the Middlesex General University Hospital where surgery was performed on his large intestines for adenocarcinoma of the Cecum. After surgery, Mr. Gasko continued to go for examinations for the next five or six years. Dr. Susan Daum testified at trial that the asbestos exposure Plaintiff suffered at the work place was a substantially contributing factor in the development of the cancer of the Cecum. Dr. Daum further testified that

the Plaintiff had to be concerned about the reoccurrence of the cancer in the future. Plaintiff further testified that he had scarred from the operation in addition a weakness and pain in the area of surgery, and an inability to work as hard as he used to before the surgery.

A motion for new trial or in the alternative Remittitur was filed by Defendants, and at the motion, the Court, Judge Mannion, determined that Plaintiffs verdict was excessive and granted Remittitur in the amount of $200,000.00 for the Plaintiff, William Gasko, and $20,000.00 for the Plaintiff, Marie Gasko. The Court further stated that in the event the Plaintiffs refused to accept the Remittitur within ten (10) days of the Court's Order, that the verdict was so excessive that it required a new trial on all issues.

LEGAL ARGUMENT

POINT I
PLAINTIFFS' MOTION FOR LEAVE TO APPEAL SHOULD BE GRANTED BECAUSE THE TRIAL COURT ERRED IN GRANTING A NEW TRIAL AS TO ALL ISSUES.

Assuming arguendo that Plaintiff's verdicts was excessive, the proper course of action is Remittitur or a new trial on the issue of damages. In the instant case, Plaintiffs' proofs clearly indicated that the Defendants had exposed him to asbestos and asbestos fibers in the work place. Furthermore, it was clear from the testimony of Defendant's expert, Dr. Susan Daum, that this exposure to asbestos substantially increased Plaintiff's chances of colon cancer to the extent that studies had shown that one exposed to asbestos fibers had a fifty (50%) percent increase in the changes of developing cancer of the colon. Our Appellate Division in

Henter v. Preybylowski, 216 N.J. Super. 513, (App. Div. 1987) had held that Remittitur or a new trial on damages is the appropriate remedy where a jury verdict of damages is shockingly excessive. Ordinarily, Remittitur may and should be used to reduce an excessive jury verdict. The Court in Henter held this based on Fritsche v. Westinghouse Electric Corp., 55 N.J. 332, (Sup. Ct. 1970). In order to grant a Remittitur, the verdict must be one which is so disproportionate to the injury that the trial judge's conscious is shocked and convinced that to sustain the award would be manifestly unjust. Taweel vs. Starn's Shoprite Supermarket, 58 N.J. 227, (Sup. Ct. 1971) supported the preposition that Remittitur may only be employed in cases where if the Plaintiff declines the reduction and the issue of liability has

been clearly and properly decided, he must submit to a new trial as to damages. In the instant case, the initial decision of the trial court would tend to indicate that the judge felt that pursuant to Taweel, a Remittitur was the appropriate remedy.

Unfortunately, after granting the Remittitur, the trial court ordered that if plaintiffs refused the Remittitur, there should be a new trial on all issues, including the issue of causal relationship between the exposure to asbestos and the development of Plaintiff's cancer. Clearly, this flies in the face of the rational expressed in Taweel, Supra. and in Henter v. Preybylowski, Supra.. In those cases both courts have held that unless the verdict is so grossly excessive as to indicate that the entire proceedings were tainted, the court should only grant a new trial as to damages.

Moreover, in Baxter v. Fairmont Food Company, 74 N.J. 588 (Sup. Ct. 1977), our Supreme Court has held that the court should not overturn a jury verdict where there is support in the record for the jury's verdict. In the instant case, Plaintiff produced clear and unequivocable proof at trial that Defendant's products were the cause of his cancer, and accordingly if the verdict was excessive, the court should have ordered a Remittitur and a new trial as to damages only.

POINT II

A NEW TRIAL AND/OR REMITTITUR MAY BE GRANTED ONLY WHERE IT CLEARLY AND CONVINCINGLY APPEARS THAT THERE WAS A MISCARRIAGE OF JUSTICE UNDER THE LAW

Unless it clearly and convincingly appears that there was a miscarriage of justice under the law, the trial judge cannot validly intrude upon the province of the jury and overturn the factfinders

decision. Baxter v. Fairmont Food Company, 74 N.J. 588 (Sup. Ct. 1977) at 596.

Final verdicts of the appropriate finders, whether that be juries or judges, are to be accorded great deference. Our Supreme Court has said "judges are admonished to resist the natural temptation to substitute their judgement from that of the jury". Baxter Supra at 597.

As indicated in Baxter, the judgement of the initial fact finder is entitled to great respect and are to be overthrown only after careful canvassing of the records and subsequent determination that the verdict constitutes a manifest of denial of justice. "A judge may not substitute his judgement for that of the jury merely because he would have reached the opposite conclusion". Baxter Supra at 598.

The Supreme Court has consistently held

that a trial judge's discretion to overturn the verdict of the jury should be exercised with extreme circumspection.

> "A trial judge should not interfere with the quantum of damages assessed by a jury unless it is so disproportionate to the injuries and resulting disabilities shown as to shock his conscience and to convince him that to sustain the award would be manifestly unjust. In making its overview, a court must accept the medical evidence in the most favorable light to the Plaintiff; it must accept the conclusion that the jury believed the Plaintiff's injury claims and the testimony of their supporting witness, and if, tested on such bases, the verdict (even if generous) has reasonable support in the record, the

jury's evaluation should be regarded as final."

Taweel v. Starn's Shoprite Market, 58 N.J. 227 (Sup. Ct. 1971) at 236.

In light of Taweel Supra., the court should look at the testimony in the instant case. It is clear that plaintiff had cancer of the cecum for which he was operated on and a portion of his colon was removed. He testified that he had resultant scarring in the area which caused him pain and that as a result of his operation, he was weaker and could not labor as long and as hard as he used to.

Additionally, Plaintiff's expert testified that there is concern for reoccurrence of the cancer in the future. Clearly, any jury of citizens is familiar with cancer and can apply its common sense to Plaintiff's claims both past, present and

future, and determine that there is a significant concern that the Plaintiff has, and should have, about a reoccurrence of this often deadly disease. Clearly, since "jury decision is impregnable unless so distorted and wrong, in the objective and articulated view of a judge as to manifest, with utmost certainty, a plain miscarriage of justice" Baxter Supra at 623, this jury verdict should stand. It should be noted that in Friedman v. C & S Car Service, 108 N.J. 72, (Sup. Ct. 1987) our Supreme Court refused to overturn a $875,000.00 verdict in favor of the plaintiff who fractured his wrist but suffered no lost income in the past, present or future. It should also be noted that there have been numerous other verdicts in Middlesex County in asbestos related cases for amounts in excess of Plaintiff's verdict even though the injuries

were asbestosis as opposed to cancer.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that Plaintiffs' motion for leave to appeal an interlocutory order of the court be granted so that substantial issues of law and fact be resolved and that Plaintiffs' jury verdict of $700,000.00 be reinstated, or in the alternative that Defendant be granted a new trial as to damages only.

Dated: June 13, 1988

Respectfully submitted,

SHERMAN, KUHN, JUSTIN & WILSON
Attorneys for Plaintiffs/Appellants,
William Gasko and Marie Gasko

BY: _____

SECOND TRIAL - 1992

RUBIN, RUBIN, MALGRAN, KAPLAN & KUHN
501 Hoes Lane
Piscataway, NJ 08854
(908) 463-7500
Attorneys for Plaintiffs

WILLIAM GASKO and MARIE GASKO Plaintiffs, vs. CELOTEX CORPORATION, FLEXITALLIC GASKETS, INC., and RUBBEROID CO., a Division of G.A.F., Defendants	SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY LAW DIVISION DOCKET NO. L 2386-81 CIVIL ACTION CERTIFICATION OF CLIFFORD N. KUHN, JR.

CLIFFORD N. KUHN, JR., hereby certifies as follows:

1. I am an attorney-at-law of New Jersey, and a partner in the law firm of Rubin, Rubin, Malgran, Kaplan & Kuhn, attorneys for the plaintiff in the above-

entitled matter, and I am the attorney entrusted with handling this case.

2. Plaintiff, William Gasko, contracted colon cancer as a result of being exposed to asbestos while working at Goetz Gasket Plant in North Brunswick, New Jersey from October 1951 to May 1966.

3. At the trial, the jury returned a verdict of no liability in favor of the defendants on 7 December 1992.

4. In light of the expert testimony, the jury's verdict was inconsistent with the evidence presented and represents a gross miscarriage of justice.

5. The plaintiff, William Gasko, respectfully requests a new trial due to the miscarriage of justice by the jury's verdict.

I hereby certify that the foregoing statements made by me are true. I am aware

that if any of the statements made by me are wilfully false, I am subject to punishment.

Dated: 8 December 1992

_____

CLIFFORD N. KUHN, JR.

RUBIN, RUBIN, MALGRAN, KAPLAN & KUHN
501 Hoes Lane
Piscataway, NJ 08854
(908) 463-7500
Attorneys for Plaintiffs

9 December 1992

HONORABLE C. JUDSON HAMLIN
Middlesex County Courthouse
One JFK Square
New Brunswick, NJ 08901

RE: GASKO VS. CELOTEX CORPORATION, ET AL.
DOCKET NO. L 2386-81

Dear Judge Hamlin:

Enclosed please find a letter memorandum in lieu of a more formal brief with reference to the above-captioned matter.

STATEMENT OF FACTS

this action is as a result of an asbestos claim occurring between October, 1951 to May, 1966. Trial in this matter commenced on Wednesday, 2 December 1992. The medical expert, Doctor Susan Daum, testified that plaintiff's exposure to

asbestos was a significant contributory fact to plaintiff's development of colon cancer; However, despite the expert's testimony, the jury returned a verdict of no liability against the plaintiff.

Therefore, plaintiff, William Gasko, through counsel, pursuant to Rule 4:49-1, request the Court to grant a motion for a new trial.

LEGAL ARGUMENT

A PLAINTIFF SHOULD BE GRANTED A MOTION FOR A NEW TRIAL WHEN A JURY'S VERDICT IS CLEARLY A MANIFEST INJUSTICE

The jury in the case at bar rendered a verdict inconsistent with the evidence presented. When a verdict is obviously at odds with the evidence presented, a miscarriage of justice has occurred. This event must compel a new trial.

The liability expert, Doctor Susan Daum, who testified on behalf of plaintiff

examined the plaintiff and testified that plaintiff's exposure to asbestos was a significant contributory fact to plaintiff's development of colon cancer. Therefore, the verdict of no liability on behalf of defendant should be set aside and the plaintiff should be granted a new trial.

In the case of Ruth v. Tenchel, 21 N.J. 171 (9156), the jury's inadequate verdict was set aside and a new trial on damages was directed by the court. Equity directs that in a case where a verdict is not supported by the evidence, a party is entitled to a new trial.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the plaintiff's motion for a new trial be granted.

Respectfully submitted,

CLIFFORD N. KUHN, JR.

CNK:mc

cc: Picillo, Bromberg & Caruso, Esqs.
Attn: Arthur D. Bromberg, Esq.

SHERMAN, KUHN, JUSTIN & WILSON
P.O. Box 6315
Plaza I
Raritan Center
Edison, N.J. 08818
(201) 225-0303
Attorneys for Plaintiff(s)

DULIO GRASSIS, et al Plaintiffs, vs. JOHNS MANVILLE, et al Defendants	:SUPERIOR COURT OF NEW JERSEY : LAW DIVISION : MIDDLESEX COUNTY :Docket No. L-2381-81 : : CIVIL ACTION : ORDER FOR JUDGEMENT

The matter having been tried to a jury on April 12, 1988, Sherman, Kuhn, Justin & Wilson, Esquires, Clifford N. Kuhn, Jr., Esq. appearing on behalf of plaintiffs and McCarter & English, Esquires, James Keale, Esq. appearing on behalf of defendants, and the jury, on April 19, 1988, having returned a verdict against the defendants GAF and Celotex and in favor of the Plaintiff William Gasko in the amount of $500,000 and

Plaintiff Marie Gasko in the amount of $200,000;

It is on this 6 day of May 1988;

ORDERED that judgment be entered on behalf of the Plaintiff William Gasko against the defendants GAF and Celotex in the amount of $500,000 for personal injury together with interest in the amount of $386,750.01 computed at 12% per annum for a period of six (6) years, three months and sixteen (16) days and at 6% annum for a period of three (3) months and nineteen (19) days;

And it is further ORDERED that judgment be entered on behalf of Plaintiff Marie Gasko against the defendants GAF and Celotex in the amount of $200,000 together with interest in the amount of $154,700 computed at the rate of 12% annum for a period of six

(6) years, three (3) months and sixteen (16) days and at 6% per annum for a period of three (3) months and nineteen (19) days;

And it is further ORDERED that defendant pay tax costs of $50 and statutory attorneys fees of $75 for a total of $125.

_____

THOMAS B. MANNION, J.S.C.

McCARTER & ENGLISH, ESQS.
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102-4096
(201) 622-4444
Attorneys for Defendants,
Celotex Corporation
and GAF Corp.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY
DOCKET NO. L-2386-81

WILLIAM GASKO, MARIE GASKO et. al.,

Plaintiffs,

v.

JOHNS-MANVILLE CORP., et al.,

Defendants.

: Civil Action

: ORDER GRANTING REMITTITUR OR A NEW TRIAL

This matter having been brought before the Court pursuant to a Motion for a new trial, judgment notwithstanding, or

remittitur by defendants, following a verdict in favor of the plaintiffs, the Court having considered the moving papers and the opposition thereto and oral argument before the Court on May 13, 1988, Clifford N. Kuhn, Jr., Esq. appearing on behalf of plaintiffs, and James H. Keale, Esq. appearing on behalf of the defendants, the Court having considered this matter and ruling that the jury verdict was ~~so~~ excessive ~~as to demonstrate prejudice or partiality,~~ and good cause having been shown,

It is on the 23rd day of May, 1988,

ORDERED that plaintiff, William Gasko, accept $200,000, plus interest, by way of a remittitur from the verdict of $500,000 returned by the jury plus pre-judgment interest and

IT IS FURTHER ORDERED that plaintiff,

Marie Gasko, accept $20,000, plus pre judgment interest, by way of a remittitur of the verdict of $200,000 returned by the jury, and

IT IS FURTHER ORDERED that should either plaintiff reject the Order for Remittitur within ten (10) days thereof ~~from the date of the Court's ruling~~ a new trial on all issues will be granted, and

IT IS FURTHER ORDERED that a true copy of the subject Order be served upon all counsel within seven (7) days from the entry hereof.

_____

Hon. Thomas B. Mannion, J.S.C.

PAPERS CONSIDERED:

___ NOTICE OF MOTION
___ MOVANT'S AFFIDAVITS
___ MOVANT'S BRIEF
___ ANSWERING AFFIDAVITS
___ ANSWERING BRIEF
___ CROSS-MOTION
___ MOVANT'S REPLY
___ OTHER

McCARTER & ENGLISH
Four Gateway Center
100 Mulberry Street
Newark, New Jersey 07102-4096
(201) 622-4444
Attorneys for Defendants
The Celotex Corporation
GAF Corporation

	SUPERIOR COURT OF NEW JERSEY
WILLIAM GASKO and MARIE GASKO his wife,	LAW DIVISION: MIDDLESEX COUNTY
Plaintiffs,	Civil Action
v.	ORDER
THE CELOTEX CORPORATION, et als.,	
Defendants.	

This matter having been opened to the Court by McCarter and English, attorneys for defendants, The Celotex Corporation and GAF Corporation, for an Order dismissing the claims of William Gasko and Marie Gasko;

The Court having considered the moving and responding papers and the argument of

counsel, and good cause appearing;

IT IS on the 19th day of September, 1989;

ORDERED that the application of defendants, The Celotex Corporation and GAF Corporation, is granted and the claims of William Gasko and Marie Gasko be and hereby are dismissed with prejudice for the reasons stated on the record on September 15, 1989.

THOMAS B. MANNION, J.S.C.

PICILLO BROMBERG CARUSO
100 Passaic Avenue
Fairfield, NJ 07004
(201) 227-8500
Attorney for Defendant,
GAF Corporation

WILLIAM W. GASKO, et. al.	: SUPERIOR : COURT : OF NEW : JERSEY
Plaintiff,	: LAW : DIVISION: : MIDDLESEX : COUNTY : DOCKET NO: : L-2386-81 Asbestos Litigation
VS.	Civil Action
CELOTEX CORPORATION, et.al.	JUDGMENT
Defendants.	

THIS MATTER having been tried before the Honorable C. Judson Hamlin on December 2, 3, & 7, 1992, and the jury having returned a verdict in favor of the defendant, GAF Corporation,

IT IS on this 18th day of December, 1992

ORDERED that a Judgement in favor of the defendant, GAF Corporation dismissing the plaintiff's Complaint shall be and is hereby entered, with prejudice, and without costs.

C. Judson Hamlin, J.S.C.

PICILLO BROMBERG CARUSO
100 Passaic Avenue
Fairfield, NJ 07004
(201) 227-8500
Attorney for Defendant,
GAF Corporation

WILLIAM W. GASKO, et. al.:	SUPERIOR COURT OF NEW JERSEY
Plaintiff, :	LAW DIVISION: MIDDLESEX COUNTY
vs. :	DOCKET NO: L-2386-81 Asbestos Litigation
	Civil Action
CELOTEX CORPORATION, et.al:	ORDER
Defendants.	

THIS MATTER having been opened to the Court by Rubin, Rubin, Malgran & Kuhn, attorneys for plaintiff, for an Order granting plaintiff a new trial in this matter, and the Court having considered the matter, read the papers submitted, heard oral argument, and for good cause shown,

IT IS ON THIS 8th DAY OF JANUARY, 1993

ORDERED that plaintiff's motion for a new trial shall be and is hereby denied.

_____

C. Judson Hamlin, J.S.C.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2963-91T1

WILLIAM GASKO and MARIE GASKO
Plaintiffs-Appellants,

v.

CELOTEX CORPORATION, FLEXITALLIC GASKETS, INC. and, RUBBEROID CO., Division of G.A.F.,

Defendants-Respondents.

Submitted December 6, 1993 - Decided

Before Judges J. H. Coleman and Thomas.

On appeal from Superior Court, Law Division, Middlesex County.

Appellants filed a pro se brief.

Picillo, Bromberg and Caruso, attorneys for respondent G.A.F. Corp. (Arthur D. Bromberg, of counsel; Gary Van Lieu, on the brief).

PER CURIAM

This is an appeal by plaintiff William Gasko and his wife from an adverse jury verdict denying plaintiff's claim of

asbestos-related colon cancer. We affirm.

This appeal follows a second trial. The first trial was conducted in April 1988 and resulted in a jury verdict of $500,000 for plaintiff and $200,000 for his wife, Marie Gasko. Defendants' motion for a new trial, or in the alternative, a remittitur, was granted. The trial judge ordered a remittitur in the amount of $200,000 for plaintiff and $20,000 for his wife, or in the alternative a new trial on all issues. Plaintiffs rejected the remittitur and a new trial ensued.

Prior to commencement of the new trial, however, defendants moved for summary judgment, contending that plaintiff's proof of medical causation was legally insufficient. The judge found that plaintiff's epidemiological evidence, to be presented by Dr. Susan Daum, was

inadmissible. The judge granted the motion and we reversed that summary judgment in Grassis v. Johns-Manville Corp., 248 N.J. Super. 446, 458 (App. Div. 1991). Grassis was decided May 30, 1991, and the Gasko retrial was scheduled to begin on April 27, 1992. One of the defendants requested an adjournment until after the Supreme Court rendered its decision in Landrigan v. Celotex Corp., which also dealt with the admission of epidemiological studies in colon cancer cases. Landrigan, supra, 127 N.J. 404 (1992), was decided May 6, 1992. The Gasko trial was then rescheduled to commence on September 28, 1992, but adjourned to November 2, and then to December 2, 1992.

A jury trial was conducted beginning December 2, 1992. Dr. Susan Daum testified for plaintiff, and she relied upon

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We have considered the issues raised in plaintiffs' pro se brief in light of the record and find they are clearly without merit. R. 2:11-3(e) (1) (B),(C) and (E). The case essentially involved a battle between the experts, and the jury was free to decide which expert was more persuasive.

The issues raised concerning adjournments and delays in prosecuting the second trial were discretionary with the trial court. Although plaintiff was unable to eventually produce the live testimony of Lewis Ruppert respecting whose asbestos was contained in materials used at plaintiff's job site on certain dates, the trial judge overcame any prejudice to plaintiff by allowing plaintiff to read Ruppert's prior testimony to the jury. Furthermore, some of the delay was caused by plaintiff's inability to produce Dr. Daum earlier. Finally, the charge did not contain error.

The order denying the motion for a new trial and the judgment dismissing the complaint are affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Clerk

SUPREME COURT OF NEW JERSEY
C-666 September Term 1993
38,007

WILLIAM GASKO, et al.,

Plaintiffs-Petitioners,

v. ON PETITION FOR CERTIFICATION

CELOTEX CORPORATION, et al.,

Defendants-Respondents

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2963-92 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 8th day of March, 1994.

CLERK OF THE SUPREME COURT

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

CLERK OF THE SUPREME COURT
OF NEW JERSEY

January 29, 1993

WILLIAM & MARIE GASKO
Box 42C
Federal Road
Englishtown, NJ 07726

RE; GASKO V. CELOTEX, ET AL.
DOCKET NO. 1-2386-81

Dear Mr. & Mrs. Gasko:

I have been informed that you called my office on January 29, 1993, to inquire about the time within which you have to file an appeal. Please be advised that the final judgment in the matter of Gasko V. Celotex, et al. was entered on December 18, 1992, by the Honorable C. Judson Hamlin. Prior to the entering of that order, I filed a motion for a new trial on December 9, 1992. On January 8, 1993, Judge Hamlin signed an order denying that motion. Consequently, you have 45 days from January 8, 1993, within which to file an appeal. There is 31 days in January, so by my calculations, the last day to file an appeal would be February 22, 1993. I am enclosing a copy of the order of judgment and the order denying the new trial.

I would suggest that if you intend to file an appeal, you should consult with counsel. Please be advised that I do not wish to undertake the appeal.

Very truly yours,

CLIFFORD N. KUHN, JR.

CNK:amm
Certified Mail (RRR)

List of Attorneys Who Declined to Represent Us

1. L. Marinari - 609/890-0900
2. Start & Stark - Mr. Sherman -609/896-9060
3. Arlene Reiter - 828-6226
4. Jane Cantor - 214-1800
5. A. Stockton - 609/890-0900
6. C. Kuhn - previous lawyer - 463-7500
7. J. Newman - 247-4300
8. Kenneth Potis - 922-9500
9. Cheryl Jannarone - 566-9101

Agencies Contacted

1. Middlesex County Bar Association
2. Monmouth County Bar Association
3. Public Defender - Freehold
4. Legal Aid - Middlesex County
5. Legal Aid - Monmouth County

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110 Special Notices

WANTED - Lawyer to take civil case that may go to Supreme Court. Call 445-9205 - ask for Mrs. Gesko or leave message.

(2)

Supreme Court, U.S.
FILED
SEP 1 1994
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No. 94-288

In The

Supreme Court of the United States

October Term, 1994

WILLIAM GASKO and MARIE GASKO

Petitioners,

v.

GAF CORPORATION

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioners in a personal injury case can petition the U. S. Supreme Court for a writ of certiorari following two jury trials in the Superior Court of New Jersey, the first of which resulted in a new trial being ordered and the second of which resulted in a verdict in favor of the defendants dismissing the case, which dismissal was affirmed following petitioners' appeal by the Appellate Division of the Superior Court of New Jersey, and which petition for certification to the New Jersey Supreme Court was denied.

2. Whether the petition for certiorari of a personal injury case involves special and important reasons and deals with federal law or questions which would warrant the Court in its discretion to grant a writ of certiorari.

LIST OF PARTIES TO THE PROCEEDING

Petitioners William Gasko and Marie Gasko were plaintiffs in the Superior Court of New Jersey, Law Division and appealed to the Superior Court of New Jersey Appellate Division and the New Jersey Supreme Court.

The only remaining defendant in the case was respondent GAF Corporation which has no parent company nor any non-wholly owned subsidiaries to list pursuant to this Court's Rule 29.1.

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No. 94-288

In The

Supreme Court of the United States

October Term, 1994

WILLIAM GASKO and MARIE GASKO

Petitioners,

v.

GAF CORPORATION

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION

RESPONDENT GAF CORPORATION RESPECTFULLY REQUESTS THAT THE PETITION FOR A WRIT OF CERTIORARI BE DENIED.

CITATION OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division denying the Gaskos' appeal and the order of the New Jersey Supreme Court denying the Gaskos' petition for certification are set forth in the Appendix.

STATEMENT OF JURISDICTION

There is no basis for jurisdiction by the Supreme Court of the United States in the within matter as the petitioners do not qualify for a writ of certiorari pursuant to 28 USC 1257(a) as alleged in their brief.

STATEMENT OF THE CASE

Petitioners William and Marie Gasko originally brought an action as plaintiffs in the Superior Court of New Jersey for personal injuries and damages against the defendants alleging that plaintiff William Gasko sustained asbestos-related colon cancer due to the liability and negligence of the defendants.

The first trial was conducted in April, 1988. William Gasko was awarded $500,000.00 and his wife, Marie Gasko, was awarded $200,000.00 on her per quod claim. Petitioners rejected the trial judge's remittitur of $200,000.00 and $20,000.00 for William and Marie Gasko respectively and a new trial was ordered (A-1-2).

The new or second trial began on December 2, 1992. At that time, Susan Daum, M. D., testified as plaintiff's medical expert and relied on epidemiological studies to support her opinion that plaintiff's colon cancer was proximately caused by asbestos exposure (A-2-3).

J. Bernard L. Gee, M. D. then testified on behalf of the defendants that plaintiff's colon cancer was not proximately caused by asbestos exposure. The jury believed the defense expert and found that the plaintiff had not

established proximate cause on the part of the defendants. Therefore, the complaint was dismissed by order of December 18, 1992. The plaintiff's motion for a new trial was denied by order of January 8, 1993 (A-3).

The plaintiffs appealed the adverse jury verdict to the Appellate Division of the New Jersey Superior Court and this appeal was denied. The Appellate Division succinctly summarized the case involved by holding that the case involved a battle of the experts and the jury was free to decide which expert was more persuasive (A-3).

The plaintiffs filed a petition for certification to the New Jersey Supreme Court which was denied on March 8, 1994 (A-4). They now petition the U. S. Supreme Court for a writ of certiorari.

ARGUMENT

I. The Court Lacks Jurisdiction Over This Case And The Petition For Certiorari Should Be Dismissed.

Petitioners allege that 28 USC 1257(a) confers jurisdiction on the U. S. Supreme Court to review the decisions below of both the Supreme Court and Appellate Division of the State of New Jersey.

However, 28 USC 1257(a) states:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of

> any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

In the case at bar, petitioners had not one but two jury trials pursuant to their constitutional rights, contrary to the allegations on page 6 of the brief that "constitutional provisions are involved" with regard to their right to a jury trial.

In the first trial, the plaintiffs refused to accept a remittitur and a new trial was ordered. The new or second trial resulted in an adverse verdict and their case was dismissed. Their appeal to the Appellate Division of the Superior Court of New Jersey was denied as was their petition for certification to the New Jersey Supreme Court (A-4).

Certainly the petitioners in appealing an adverse verdict in a personal injury case provided no "special reasons" to the N. J. Supreme Court as is required by New Jersey Court Rule 2:12-4 in seeking certification of a final judgment of the Appellate Division.

On the contrary, the petitioners simply disagreed with the outcome of their case. However, they exhausted their remedies and the matter was adjudicated with finality in the state courts of New Jersey. Moreover, a review of the language of 28 USC 1257(a) *infra*, clearly demonstrates that the U. S. Supreme Court lacks jurisdiction over the within matter.

II. The Petitioners Have Not Met the Considerations Governing Review on Writ of Certiorari Set Forth in U.S. Supr. Ct. R.10.

U. S. Supr. Ct. R.10 states *inter alia* that a petition for writ of certiorari is not a matter of right but of judicial discretion which will be granted only when there are special and important reasons therefore. These reasons invariably involve important federal law and federal questions.

In *Braxton v. U. S.*, 114 L.Ed.2d 385, 111 S.Ct. 1854, 1857 (1991) the Supreme Court held:

> A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the Circuit Courts of Appeals and state courts covering the meaning of provisions of federal law. See this Court's Rule 10.1.

In the case at bar no federal questions or important issues of federal law are presented. The petitioners are simply dissatisfied with the outcome of a state court jury verdict in a personal injury case in which the jury decided against them. Plaintiffs having exhausted the appellate process at the highest level in the state court, the matter has been adjudicated with finality and no special or important reasons are present to warrant a writ of certiorari to the U. S. Supreme Court.

CONCLUSION

For the foregoing reasons, this Court should deny the Gaskos' Petition for a Writ of Certiorari.

Respectfully submitted,

MARTIN G. PICILLO
PICILLO CARUSO
100 Passaic Avenue
Fairfield, NJ 07004

Counsel for Respondent
GAF Corporation

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
A-2963-91T1

WILLIAM GASKO and MARIE GASKO
Plaintiffs-Appellants,

v.

CELOTEX CORPORATION, FLEXITALLIC GASKETS, INC. and, RUBBEROID CO., DIVISION OF G.A.F.,

Defendants-Respondents.

Submitted December 6, 1993 – Decided

Before Judges J. H. Coleman and Thomas.

On appeal from Superior Court, Law Division, Middlesex County.

Appellants filed a *pro se* brief.

Picillo, Bromberg and Caruso, attorneys for respondent G.A.F. Corp. (Arthur D. Bromberg, of counsel; Gary Van Lieu, on the brief).

PER CURIAM

This is an appeal by plaintiff William Gasko and his wife from an adverse jury verdict denying plaintiff's claim of asbestos-related colon cancer. We affirm.

This appeal follows a second trial. The first trial was conducted in April 1988 and resulted in a jury verdict of $500,000 for plaintiff and $200,000 for his wife, Marie Gasko. Defendants' motion for a new trial, or in the

alternative, a remittitur, was granted. The trial judge ordered a remittitur in the amount of $200,000 for plaintiff and $20,000 for his wife, or in the alternative a new trial on all issues. Plaintiffs rejected the remittitur and a new trial ensued.

Prior to commencement of the new trial, however, defendants moved for summary judgment, contending that plaintiff's proof of medical causation was legally insufficient. The judge found that plaintiff's epidemiological evidence, to be presented by Dr. Susan Daum, was inadmissible. The judge granted the motion and we reversed that summary judgment in *Grassis v. Johns-Manville Corp.*, 248 *N.J. Super.* 446, 458 (App. Div. 1991). *Grassis* was decided May 30, 1991, and the Gasko retrial was scheduled to begin on April 27, 1992. One of the defendants requested an adjournment until after the Supreme Court rendered its decision in *Landrigan v. Celotex Corp.*, which also dealt with the admission of epidemiological studies in colon cancer cases. *Landrigan, supra,* 127 *N.J.* 404 (1992), was decided May 6, 1992. The Gasko trial was then rescheduled to commence on September 28, 1992, but adjourned to November 2, and then to December 2, 1992.

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OF NEW JERSEY